United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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To be argued by
Michael F. Armstrong

76-1435

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1435

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. KING and
A. ROWLAND BOUCHER,

Appellants.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR APPELLANT KING

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

John M. King appeals from a judgment of conviction entered September 7, 1976 in the United States District Court for the Southern District of New York after a six week jury trial before the Honorable Marvin E. Frankel, United States District Judge.

The indictment (75 Cr. 70) was filed January 20, 1975 and charged King and A. Rowland Boucher with three substantive violations of securities fraud (15 U.S.C. 78j(B)), mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343), and a conspiracy to commit these substantive offenses (18 U.S.C. § 371).

The trial commenced May 24, 1976 and concluded July 1, 1976. The jury found each defendant guilty on all four counts. On September 7, 1976, Judge Frankel sentenced King to concurrent terms of imprisonment of one year on each of counts one (conspiracy), three (wire fraud) and four (securities fraud) and to a three-year period of unsupervised probation on count two (mail fraud).

King is free on his own recognizance pending this appeal.

STATEMENT OF ISSUES

1. Did the Court commit error by excluding documents containing prior inconsistent statements of John Mecom and preventing cross-examination of Mecom regarding these statements?

2. Did the Government's admittedly intentional pre-indictment delay and the subsequent ensuing prejudice to

appellants violate due process?

3. Was it error to deny appellant's motion to dismiss for improper use of immunized testimony without an adequate hearing?

4. Was the Court in error in its rulings permitting the Government to introduce improper and collateral evidence, limiting appellant's response to that evidence, and refusing properly to charge the jury?

STATEMENT OF FACTS

Despite its great length and apparent complexity, this case was, as the prosecutor said, a "simple" one (Appendix "App." 1344C) -- at least it should have been. For the areas of dispute were narrow and the underlying business activities were in large part undisputed. Properly presented, the differences between the parties were subtle.

However, the Government's presentation of the six to nine year old evidence destroyed this orderly focus. The prosecutor injected into the case highly prejudicial proof of irrelevant transactions; he caused innocent and normal business activities to appear sinister to an unsophisticated jury; and, when he turned to the real issues, his key proof was characterized by contradictions between key witnesses, prior inconsistent statements, lost recollections, missing information and conjecture based upon the most speculative kind of circumstantial evidence.

This statement concentrates upon the important undisputed facts and the major contradictions and inconsistencies in the Government's presentation of disputed proof. Appellants respectfully submit that it is important for this Court to be made aware

of these factors insofar as they bear upon the prejudicial effect of the various legal errors raised in this appeal.

A. Undisputed Facts

In April 1968, in Acapulco, Mexico, King and Boucher, Chief Executive Officer and President, respectively, of King Resources Company ("KRC"), a Denver-based oil exploration and development company, together with a KRC geologist named Arman Frederickson, made a proposal to the board of directors of Fund of Funds Limited ("FOF"), a Geneva-based open-end mutual fund. The proposal was that KRC would locate and sell natural resource properties and services to FOF. King had been discussing this program for a number of months with Edward Cowett,* one of the FOF directors and Executive Vice President and general counsel of Investors Overseas Services ("IOS"), the manager of FOF. (Government Exhibit "G. Ex." 1F; Tr. 284-85).**

KRC had been organized by King in 1961 as a small independent oil company. By 1968 it had grown to a company with $106,000,000 in assets, 450 employees, eight division offices around the country and in Canada and representatives throughout the world. It also had one of the most highly sophisticated computer divisions in the oil business. (G.Ex. 2F).

FOF had $797 million in assets in 1968. Originally it had branched out into other areas and, by 1968, had decided

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* Cowett died long prior to trial in August 1974.

** "Tr." refers to trial transcript, "App." refers to Appendix, "G. Ex." or "D. Ex." refers to government or defense trial exhibits.

to invest in natural resources. (G. Ex. 1C; Tr. 284-85).

Following the Acapulco meeting, an agreement was reached between KRC and FOF, under which KRC would supply oil and other natural resource properties to FOF at a cost comparable to that charged KRC's other customers. During the next two years FOF became KRC's most significant customer, purchasing approximately $53,000,000 in natural resource properties (Tr. 445; App. 854).

KRC had long been interested in acquiring oil and gas exploration permits in the Canadian Arctic Islands (G. Ex. 2F). For years there had been strong indications of the presence of oil and natural gas in the Canadian Arctic. The Canadian Government issued oil and natural gas exploration permits, but in order to retain the permit and ultimately acquire a lease-hold interest, the permit holder was required to expend a certain amount of money each year on exploration or development.

The technical problems in extracting oil or natural gas from the Arctic, particularly from areas over ice-covered water, were formidable in 1968. King and Boucher were among those in the oil and gas industry who knew that important technological progress had been made to solve these problems and who believed that it was merely a matter of time before what was generally felt to be enormous oil and gas reserves could be tapped. (App. 1118-53; G. Ex. 2F; Tr. 286-88.) No one - not even the Government - has ever questioned the fervor with which appellants believed in the potential of the Canadian Arctic.

In 1968 a deal was struck between FOF and KRC whereby FOF purchased from KRC an undivided one-half interest in permits covering approximately 22 million net acres spread throughout the Canadian Arctic. FOF paid approximately $11 million for its interest (G. Ex. 1F).

In late 1968 and 1969, the value of the Canadian Arctic leases began to escalate dramatically. In July, 1969, the Canadian geological engineering firm of J.C. Sproule & Company concluded that the Canadian Arctic properties were then worth $1.88 an acre.* (G. Ex. 20C). This value represented almost a 90% increase over FOF's aggregate purchase price per acre. Subsequently a number of factors combined to cause the value of the properties to soar even higher. Sales were made at enormous prices of leases in an area in the Alaskan Arctic which was similar to the FOF/KRC Canadian properties, a "blowout" well in the Canadian Arctic caused a flaming gusher which has still not been quelled and the successful voyage of an ice-breaking tanker through the Canadian Arctic Islands indicated the feasibility of transporting oil and gas from that area. Many oilmen and investors, who could foresee property then costing five, ten or twenty dollars an acre eventually being sold to major oil companies for thousands, if not hundreds of thousands of dollars an acre, began showing a greatly increased interest in the Canadian Arctic. (Tr. 310-12, 1601, 1762-65, 1785-87, 1836-38, 1864, 1944, 1956, 3441-49).

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* This represented a cash price, without any need for present value discount calculations.

King was not shy about predicting great success for the ventures in which his company and FOF were engaged (Tr. 112-13, 240-43, 300-01).

In the light of the dramatic rise in the value of the Arctic properties, Allan Conwill, an FOF director, became concerned that the FOF Arctic interests - which were carried on the books at their original cost to FOF - were not properly valued in the FOF portfolio (Tr. 113-15). As an open-end mutual fund, FOF was required to carry the assets in its portfolio at current market value (Tr. 76-79, 322). After talking to King and receiving a highly optimistic opinion as to the future value of the properties (Tr. 112-13, 240-43, 300-01),* Conwill and the FOF board decided to revalue their Arctic holdings (Tr. 113-18). The plan was to establish a value for the Arctic by selling a small undivided portion of FOF's interest (Tr. 116-18; G. Exs. 1-I, 1J).

Given his general overall responsibility for FOF's natural resource investments, Cowett became the driving force behind the effort to revalue FOF's holdings in the Canadian Arctic (Tr. 116-18). He asked King to arrange for the sale on FOF's behalf (Tr. 3452-58).

Certain preliminary efforts to sell an undivided share were unproductive (Tr. 2102-03, 3458-62). As 1969 was drawing to a close, King arranged for FOF to sell approximately 9% of its interest to four purchasers on an installment basis

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* Cowett also was extremely optimistic about the Arctic's potential (Tr. 299-301).

(Tr. 3988, 4002). Two of these sales, a 1/64th interest to himself and a 1/128th interest to a KRC director by the name of Bennett King (no relation to John King), could not be used for valuation purposes. Two others, to an independent Denver oil company named Consolidated Oil & Gas Co. ("COG")* and to a legendary Texas oil multimillionaire named John Mecom, were clearly suitable. (Tr. 2102-03, 2246). COG purchased a 1/32nd interest and Mecom, like John King, purchased a 1/64th. All four sales were made at the same price: $7.50 for each acre in which they were acquiring an undivided interest and commitments to provide funds for the exploration required to retain the permits which, when allocated on a per acre basis, amounted to another $7.50 per acre. (App. 811-14, 821-24, 826-38).

The three sales were accomplished at year's end 1969. After subjecting the contract prices to a series of complex discounts for present worth, overriding interests and taxes, FOF revalued its remaining acreage upward on the basis of $8.01 per acre, or an aggregate of $100 million (G. Ex. 1D). Optimistic announcements of the revaluation were made by IOS in statements to FOF shareholders and to the public (D. Ex. J).

Following the revaluation, FOF's auditors, Arthur Andersen & Co.,** routinely confirmed the nature of the

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* COG is a publicly held company whose shares are traded on the American Stock Exchange.

** Arthur Andersen were also the auditors for KRC and for Mecom's corporate vehicle, U.S. Oil. Mecom testified that Arthur Andersen personnel had full access to his financial records (App. 1362-63, 1399).

transactions with the purchasers and also inquired specifically of KRC whether the sales establishing the revaluation had been arms-length and bona fide. Both COG treasurer, Harold Gutjahr, and John Mecom's attorney, Neal Marriott, furnished written confirmations to Arthur Andersen of the terms of their respective transactions (App. 869-70, 1098-99). King and Boucher (as well as Roger Davis, KRC Vice President and Controller) signed representation letters to Arthur Andersen stating that the sales were arms-length and bona fide (App. 843-45).

Later, in May 1970, a newspaper report speculating about the COG transaction (App. 1102-03), prompted investigations of the Arctic sales by the American Stock Exchange and the SEC (D. Ex. JJ). As a result of the press stories (Tr. 2113-19), Arthur Andersen asked King, Boucher and Trueblood to sign additional representation letters, stating again that the transaction was arms-length (App. 846, 1100-01). COG also issued an explanatory letter to its shareholders (App. 839-42). Trading was resumed in COG stock and the SEC did not find it necessary to conduct a formal investigation.

During the spring of 1970, King attempted, unsuccessfully, to take over IOS. After a series of ill-fated events, KRC suffered a financial collapse and went into bankruptcy reorganization in August 1971 (Tr. 2972; App. 189-214). King resigned as Chief Executive Officer of KRC on August 10, 1970 (Tr. 3556), and declared personal bankruptcy on June 1,

1971.* Boucher continued as KRC's Chief Executive Officer until August 30, 1973 (Tr. 388). In December 1970, John Mecom and his wife filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the Eastern District of Louisiana. These proceedings continued through 1971 and eventually Mecom paid all his creditors in full (Tr. 925).

During 1970, the Arctic transactions fell by the wayside. COG continued to honor its commitments under its contract but turned to litigation when KRC sold a portion of the interest to Sun Oil in the fall of 1970 (Tr. 507, 1732). Bennett King rescinded his contract after the Sun Oil sale (G. Exs. 8Q, 8R). John King made no payments under his agreement after entering bankruptcy (Tr. 511). Mecom refused to make payments in 1970 after he failed to be awarded the contracts for drilling in the Arctic; ultimately he settled his resulting differences with KRC in an agreement with the KRC trustee in bankruptcy in 1972 (Tr. 936, 1046-51, 1071-72; App. 1090-97).

B. Disputed Issues of Fact

1. General Contentions.

The Government contended at trial that the sales to Bennett King, COG and Mecom were all sham transactions engineered by King and Boucher for the purpose of enabling

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* Since 1970, King has been involved in numerous civil lawsuits, several of which have related to KRC's reorganization, IOS and the Arctic (App. 187-88).

FOF to revalue its remaining Canadian Arctic properties at an inflated price. Appellants allegedly were motivated by their desire to curry favor with a valued customer and the method they were charged with using was to enter into secret side deals with the purchasers whereby appellants agreed to buy the interest back or otherwise guaranty that the purchasers would not have to pay the price set forth in the written contracts.

Appellants contended that there were no secret side agreements, and that the only understandings not embodied in the written contracts were those that were normal and appropriate, in the oil business, for dealings between co-owners of undivided interests under development.

Although three of the purchases are challenged in the indictment, the Government's case at trial ultimately stood or fell on whether the Mecom transaction was proven to have been a sham.

2. The Bennett King and COG Transactions.

The Government alleged, and attempted to prove, that the written contracts with Bennett King and COG were not genuine. However, not one witness or document was produced to say so, and everyone connected with these transactions vigorously denied the allegations.

Bennett King purchased only a tiny share (1/128). His position as a director of KRC was no secret, and Arthur Andersen did not rely upon his purchase in reviewing the revaluation (Tr. 2102). The Government's only proof with respect to the allegedly illegitimate nature of the Bennett

King transaction was a hearsay statement attributed to Bennett King which the Government interpreted in a way vigorously denied by Bennett King on the stand (Tr. 1209-13, 1238-41).

The COG transaction was the largest of the four purchases, a 1/32nd interest. Harry Trueblood, the president of COG, took the stand as a Government witness, but testified that the transaction was totally arms-length and that he and his company continued to place great value on the Canadian Arctic (Tr. 1736-39, 1746-52, 1769). The Government sought to prove its contrary contention by attempting to impeach Trueblood* and construct speculative theories based upon highly circumstantial evidence of a type which was necessarily misleading and confusing to a jury unfamiliar with business procedures (none of the jurors were businessmen). No affirmative evidence was offered of any side agreement affecting the COG transaction.

The Government argued, in the face of contrary testimony from every witness who was in any way involved, that a sale from COG to KRC in 1970 of an oil lease in Alaska was made at an artificially high price as a secret quid pro quo for the Canadian Arctic transaction. Only $700,000 in value (Tr. 1955-56) the transaction was an unlikely quid pro quo for a Canadian Arctic purchase which had a

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* Trueblood's testimony before the SEC and Grand Jury was the same as at trial. Prior to trial, the prosecutor, in his words, "indirectly inferred" to Trueblood's attorney that if Trueblood changed this sworn testimony he would not be prosecuted for perjury. Trueblood was presented with this offer and declined it. (Tr. 3230-36).

cost to COG of about $10,000,000. Furthermore, undisputed testimony showed that in early 1970, KRC rejected deals offered by COG aggregating almost $6,000,000. These rejected deals could have been ready vehicles for the supposed under-the-table repayments if such had been contemplated (Tr. 1775-79, 2479-84).

Similarly, the Government contended, without any proof, that the admitted fact that appellants introduced COG to the bank which arranged the financing for the downpayment under its Arctic contract somehow affected the bona fide nature of the transaction.

The Government also attempted to construct something sinister from the fact that COG borrowed money in 1970 from the State of Ohio and then reloaned a substantial portion to a subsidiary of the Colorado Corporation, a King related entity.* Both the Ohio loan and the reloan were paid back in 1970. The Government argued, again without a single witness, that the repayment by Colorado Corp.'s subsidiary was a secret financing of part of COG's obligation under the Arctic contract, despite the fact that COG repaid the State of Ohio shortly thereafter.

Finally, the Government argued that Trueblood had in fact been given a buy-back agreement. There is not one shred of evidence regarding such an agreement aside from an ambiguous statement attributed to Trueblood in the 1970 Wall Street Journal article (App. 1102-03). The defense

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* The president of the Colorado Corp. subsidiary was a close friend of Trueblood and was the first to inform Trueblood that Ohio was a source of available financing for COG (Tr. 1680).

contended that it was absurd to conclude that Trueblood would have disclosed a secret illegal buy-back deal to a reporter who was interviewing him "on the record" for a news article.

The Court, in its charge to the jury, did not present three of the five Government contentions summarized above: the Ohio loan, the bank financing and the entire Bennett King transaction.

3. The Mecom Transaction

a. Summary

The most sharply drawn factual dispute in the entire case concerned the terms of John Mecom's Arctic purchase. With respect to this transaction, unlike the others about which the Government speculated, testimonial and documentary proof was offered to indicate that appellants had entered into a secret buy-back agreement with Mecom in 1969.

The vital issue upon which King's guilt or innocence turned was the substance of his understanding with Mecom. King readily admitted that he had assured Mecom of the profitability of the venture and had told him that KRC had a variety of drilling business, including, perhaps, work in the Arctic, which Mecom probably could obtain and from which he could earn enough to make his payments under the contract (Tr. 3513-20). Mecom, on the other hand, contended that he had told King, Boucher and Robert Hulsey, a KRC employee and a long-time Mecom confidant,* that he was cash poor and could not enter

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* Hulsey was an appraiser who in 1969 had been with KRC for two years after previously working closely with Mecom for many years (Tr. 817-19, 863). Subsequent to 1969, and prior to his testimony at trial, Hulsey returned to Mecom's employment.

into the contract. Mecom said he agreed to do so only when Hulsey assured him he would receive specific acreage in the Arctic (as opposed to the undivided interest provided in the contract) and, further, KRC would provide him with drilling work in the Arctic which would assure Mecom that he would not be required to fund his purchase out of the assets he then owned. Mecom also recalled, somewhat hesitatingly, that there was talk about a buy-back agreement. (Tr. 922-33; App. 1350, 1356-58, 1361, 1364.)

If King's version of his conversations with Mecom was correct, there was no secret side agreement, but simply a normal straightforward deal for an undivided interest to be developed co-operatively, with the usual understandings as to available work and methods of financing. If Mecom's version was to be accepted, the agreement was fundamentally different from that contained in the written contract relied upon by FOF and the public. Mecom explained that he signed the contract in order to "suit the accountant", but that he did not consider it to reflect his "real deal" with King (App. 1364-65).

b. Evidence Regarding the Mecom Transaction

1. Preliminary Discussions.

In addition to the testimony of King and Mecom, discussed above, recounting their conversations, Robert Hulsey testified regarding his conversations with King and Boucher about the possibility of Mecom's purchasing an interest in the Arctic, and receiving a personal guarantee from King (Tr. 822-

23, 828-31). According to Hulsey, Mecom rejected the idea (Tr. 825-28).

2. December 24, 1969 Contract.

All the Arctic contracts were drafted by Robert Dippo, an attorney for KRC. The Mecom contract was given to Hulsey to take to Houston for Mecom's signature (Tr. 836-38). None of the contracts contained any reference to side agreements or buy-backs.

Hulsey testified that before going to Houston he discussed with Boucher work agreements and a buy-back guarantee to be furnished by King (Tr. 833-34). Boucher denied the conversation (App. 1295E).

Hulsey testified further that he met with Mecom and Neil Marriott on December 24, 1969. (Tr. 836-37). Hulsey told Mecom and Marriott that King had "indicated" that he would repurchase Mecom's interest if Mecom was not satisfied and that Mecom would be given work on leased properties to enable him to pay for the acquisition (Tr. 837-38). Mecom signed the agreement on the spot, allegedly on the assurance that Hulsey would hold the contract until it had been redrafted to Marriott's satisfaction (Tr. 839).

Mecom recalled the Christmas eve meeting. (Tr. 923-24) He testified that he had objected to the contract because his interest was not segregated (Tr. 924). He said he signed the contract because Hulsey promised him that if he did so another company would assume his obligations under the contract (Tr. 924). He remembered that Hulsey said something about a buy-back

(Tr. 932-33) , but that aspect was not important to him (App. 1356-59). (In his grand jury testimony, Mecom had not recalled any buyback guarantee. When asked if he had been told by anyone that King could buy him out of the contract if he was not satisfied, Mecom responded, "I don't remember that. It could have been, but I just don't remember ... .") (App. 1356-57).

Marriott testified in a fashion similar to Mecom. He said that it was understood that Mecom was not to pay any cash under the agreement, that Mecom was to be given drilling rights in the Arctic itself, and that the profit from the drilling would be applied to meet his obligations under the contract (Tr. 1014-15).

3. Follow-up to December 24, 1969 Meeting

Hulsey testified that he reported the results of the Christmas Eve meeting to Boucher (Tr. 839-40), and, pursuant to Mecom's instructions, placed the contract in his own desk for safekeeping (Tr. 840). He said that he later found that the contract had somehow been spirited away (Tr. 840-42), but never inquired of Boucher or anyone else at KRC as to what had happened to it and did not report the loss to Mecom or Marriott (Tr. 885). Robert Dippo, the lawyer who had drafted the contract, testified that he had a conversation with Hulsey following Hulsey's return from Houston and that Hulsey said nothing to him about the contract having been rejected (Tr. 4160-61). Dippo received the signed contract

"in the normal course of business" (Tr. 4162).*

4. Follow-up with respect to Alleged Side Agreement

Mecom purported, in his trial testimony, to have had little concern with executing a contract which exposed him to a multi-million dollar liability. Despite his understanding that the contract did not express the true agreement, he testified that he simply left the matter to Marriott to handle. (Tr. 926, 931-32, 938; App. 1356, 1364-65.)

Marriott testified that he pressed Hulsey about the promised side agreement for over a year, but never inquired of anyone else at KRC with respect to it and did not bother to pursue the matter unless he happened to be in his office in Houston (Tr. 1076-78, 1082-83). Hulsey, on the other hand, testified that after an initial telephone inquiry in January, 1970 which he referred to Lowry (Tr. 842-43), Marriott never spoke to him about the matter again, despite the fact that they had other significant business contacts during the year (Tr. 885-88).

Hulsey never heard from anyone what, if anything, happened regarding any supplemental side agreement. He could not testify from his own knowledge whether any such agreement ever existed.

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* In response to a question by defense counsel as to whether he "usually' paid much attention to what Hulsey said, Dippo testified "I tried to initially, and then I could never figure out what he was saying so I just gave up on it . . . To me, Mr. Hulsey was the most confusing speaker I've ever met" (Tr. 4164).

5. Government Exhibit 1

Marriott claims that in response to his inquiry of Lowry in January 1970, he received two documents which comprise Government Exhibit 1. The first was an undated handwritten memorandum signed by Lowry which referred to an attached document, saying that the document would be retained in "my Chicago office vault until Jan. 1, 1972" (App. 799). The attached document was a one-page unsigned letter to Mecom, dated as of December 24, 1969, which provided, in somewhat confused language, that the writer, presumably King, would provide Mecom with sufficient funds to make payments on the Arctic contract until October 1971 and, between October and December 1971, Mecom could assign his interest to the writer (App. 800). The letter, the only direct documentary evidence of any side agreement, is a strange document. Although it purports to be a legal document prepared by an attorney, it is not on letterhead or otherwise formalized, it is unsigned and does not have King's name on it anywhere, it calls for no signature or acknowledgment by Mecom, and the name of its alleged author, Lowry, is misspelled (App. 799-800).*

Marriott testified that the letter he received from Lowry was unsatisfactory and did not represent the agreement for which he was waiting (Tr. 1023-25). He did not, however, notify Lowry of his objections but claimed instead he called

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* An alleged copy of the letter, which Marriott had sent to Arman Frederickson, was shown to SEC attorney John Kelly in March, 1971. Kelly made careful, contemporaneous notes of what he had been shown. His notes describe a document of significantly different terms from Government Exhibit 1 (Tr. 4004-12; App 1199-1201).

Hulsey to notify him that the draft was rejected (Tr. 1075-77). As noted above, Hulsey denied having received any such call.

Of particular interest is Marriott's testimony that he had previously received a request from Arthur Andersen for a confirmation on behalf of Mecom of the terms of the Arctic contract. (Tr. 1028-31; App. 1229-33). Marriott said he deliberately waited to send the confirmation stating that the written contract had no other terms until he had received the letter from Lowry that purported to reflect such terms. Marriott could not explain this curious behavior; nor could he reconcile his trial testimony with sworn testimony he gave only two months prior to trial when he had testified that he had sent the confirmation to Arthur Andersen before receiving the letter from Lowry. (App. 1234-44).

Lowry, who at trial was 71 years of age, testified that either he or Hulsey had prepared a document like Government Exhibit 1 (App. 1248-49). He said that the original had been signed by King and kept by Lowry in Lowry's safe in Chicago until January 1972 when, in the course of an office move, Lowry had destroyed it (Tr. 1403-1405, 1408).

Lowry's trial testimony was flatly contradicted by his own testimony given to the IRS in February 1972, only two months after he had allegedly destroyed the document supposedly held in his safe. In an IRS transcript (which he reviewed and

initialled a few months later), Lowry is quoted as testifying that a guarantee had been "discussed" with respect to the Mecom deal but no such document had ever been "consummated or "executed" (App. 1250-58). At trial, Lowry was unable to explain this inconsistency, nor could he explain his 1974 deposition testimony wherein he averred that he might well have signed the document himself (App. 1259).

6. February 10, 1970 telephone conversation between King and Mecom. Lowry testified that he might have sent the undated Government Exhibit 1 to Marriott as late as February 1970 (App. 1261). This testimony is extremely important because of a contemporaneous memorandum written by King of a phone call from Mecom on February 10, 1970 (App. 1117; D. Ex BA). Mecom told King he was being pressed by his banks and might require some assistance with his Arctic obligations. During that conversation King expressed a willingness to try to find a buyer for Mecom's interest or to buy it himself (Tr. 3433-37; App. 1117). As the Court charged the jury, if the only agreement regarding a buy-back agreement occurred after this conversation, there could not have been a conviction, since the agreement would not have been part of the original sale (App. 1447).

7. Post-Contract Negotiations between King and Mecom. In the year following the signing of the Arctic contract, King and Mecom, sometimes with Hulsey and Marriott, met on several occasions in both business and social settings.

(Tr. 950-51, 886-88, 1082-83, 3539-45). Although Mecom was supposedly still waiting for the side agreement which would relieve him of his obligation under the "sham" Arctic contract, there is no testimony from either Mecom or Marriott that the contract was raised with King on any of these occasions.

8. $275,000 Payment. Mecom's initial payment of $260,000 under the Artic contract was paid on January 22, 1970 (G. Ex. 6C). At the same time, a check was delivered to Mecom in the amount of $275,000 by a subsidiary of Colorado Corporation (G. Ex. 6L). There was some evidence that Colorado Corp. and its subsidiary had independent dealings with Mecom and that the $275,000 was an advance in order to reserve one of Mecom's drilling rigs for a deep prospect in Texas (Tr. 1515-16). Arthur Andersen looked into this payment as part of an analysis of the Arctic transaction, and concluded that the $275,000 was a bona fide and independently motivated advance. Similarly, Marriott stated that the $275,000 payment was an advance on Mecom's drilling rigs in a letter which he sent in May, 1971 to the counsel for the co-receiver in Mecom's bankruptcy (App. 1074-76). In any event, King testified under oath that while he did not remember ordering the payment, he took full responsibilty for it and acknowledged that it could not have been made without his authorization. He said that he would have had no hesitation in advancing Mecom a sum in this amount any time Mecom asked him to (Tr. 3523-24, 3563).

9. Mecom's Drilling Bid. Requests for bids for drilling in the Arctic were sent out by KRC in December 1969,

before the Mecom contract was executed. The drilling contracts were scheduled to be awarded on or about February 4, 1970. When Mecom complained in February 1970 that he had not been given an opportunity to bid on this work,* Boucher extended the time period for bids for several days. Mecom testified that he considered Boucher's offer unrealistic, because he could not have formulated his bid within the time allotted by Boucher. Boucher said that he kept the bidding open for Mecom for a while, but that the contracts were awarded to another driller when Mecom's personnel advised Boucher that Mecom's rigs could not be used in the Arctic at that time (G. Ex. 6G; D. Ex. BN; Tr. 938-39, 963-68, 2959-62).

10. Mecom's Assignment of Arctic Interest to Colorado Corp. In a letter dated February 19, 1971 to KRC director Arman Frederickson (App. 816-17), Marriott outlined a version of the Mecom transaction calculated to permit Mecom to walk away from his contractual obligations. Marriott told Frederickson that there had been a secret buy-back agreement and requested a reassignment of Mecom's interest to KRC. Attached to his letter was a copy of Government Exhibit 1 and a copy of the $275,000 check delivered to Mecom by a Colorado Corp. subsidiary. Marriott neglected to mention to Frederickson, however, that Government Exhibit 1 did not comport with Marriott's understanding of the agreement (Tr. 1107).

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* A strange oversight if, as the Government contended, Mecom had been guaranteed this work in a secret side agreement.

In the spring of 1971, a settlement was devised whereby Colorado Corp. would assume Mecom's Arctic commitments (Tr. 1046-47, 1051-52). In connection with the settlement, Marriott wrote a letter to Frederickson on May 26, 1971, retracting as mistaken his earlier allegations of a buy-back contained in Government Exhibit 6H (Tr. 1054-55; App. 818-19). Marriott claimed that his reversal was forced by pressure from King (Tr. 1036-39), an allegation King denied (Tr. 3467-68).

Marriott also wrote a letter to Richard Sadler, attorney for the co-receivers in Mecom's proceeding, outlining the proposed settlement with Colorado Corp. and explaining the terms of the KRC Arctic contract in detail -- with no mention of any buy back or guarantee (App. 818-19, 1222-25). Marriott knew that his allegedly false letter to Sadler would be submitted to the bankruptcy court in support of any settlement (App. 1221). He stated that he was determined "to do whatever [he] could to get Mr. Mecom out of his . . . liability . . . ." (App. 1221).

On May 30, 1971, a settlement between Mecom and Colorado Corp. was entered into whereby Mecom assigned his Arctic interest to Colorado Corp. and was released from liability to repay the advance of $275,000 (G. Exs. 6X,6Z). However, Boucher refused, on KRC's behalf, to recognize this assignment and, as far as KRC was concerned, Mecom remained obligated.

POINT I

THE TRIAL COURT COMMITTED ERROR BY EXCLUDING DOCUMENTS CONTAINING PRIOR INCONSISTENT STATEMENTS OF JOHN MECOM, AND PREVENTING CROSS EXAMINATION OF MECOM REGARDING THE STATEMENTS

In late 1970 and early 1971 John Mecom filed a number of documents in his personal bankruptcy proceedings which flatly contradicted the most relevant part of his testimony at trial - his assertion that his written contract with KRC was of no effect and that he had a contrary side agreement with appellant King. When Mecom testified at trial, defense counsel attempted to impeach his credibility by offering ten exhibits comprised of testimony and documents, some of them sworn statements by Mecom, which were taken from the court files of the bankruptcy proceedings. After initially accepting the documents in evidence, the trial court improperly struck them from the record and refused to allow defense counsel to cross-examine Mecom about them. Three exhibits were ultimately admitted in evidence, after Mecom had left the stand and the documents' effectiveness had been destroyed.

A. The Facts

1. Mecom's Trial Testimony

Mecom testified at trial that his written contract with KRC "was merely something that they sent [him] to suit some

accountant. It was not a real deal" (App. 1364). Mecom claimed that his actual agreement with KRC involved a segregated rather than an undivided interest, that "some of Mr. King's companies or related friends" were to put up the money for Mecom's payments, and that if "[Mecom] was not able to go ahead with it, they [King or KRC] would take the interest over" (Tr. 924, 932).

This testimony was obviously central to the Government's case. Mecom was the principal in the transaction upon which the Government placed its chief reliance. He was the only purchaser of an Arctic interest who claimed that his written agreement was, as the Government charged, a sham. He was the only witness in the entire case who testified to actual participation in a claimed side agreement.

2. The Bankruptcy Documents

In December, 1970, approximately one year after the Arctic transaction, Mecom and his wife filed a Chapter XI bankruptcy petition. The KRC Arctic contract was by far the largest liability facing Mecom in his bankruptcy,* and if a side agreement

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* Of the $3,736,489.94 secured and unsecured debt actually outstanding, $2,348,208.45 was owed to KRC as payment for the Arctic (D.Ex. AA) (App. 994). Mecom's sworn detailed schedule of debts and assets (D.Ex. AA) listed total debts of $100,051,808.61 and total assets of $48,784,517.14 (App. 1052). The vast majority of this debt, however, consisted of pledges or guarantees of the debts of two of his corporations ($96,315,318.67) which were also secured by income from oil production (D.Ex. BB) (App. 1052, 1063).

had existed of the sort later alleged by the Government (and testified to by Mecom), it would have been used, according to Mecom's bankruptcy attorney, to avoid the KRC obligation (Tr. 4124). Since Mecom made no reference in his bankruptcy papers to any side agreements, and, instead, acknowledged the genuineness of the KRC contract, it would be reasonable to conclude that no side agreement actually existed. The defense sought to use the bankruptcy documents to make that point to the jury.

Mecom's sworn petition for an arrangement (D.Ex. U), filed on December 3, 1970, listed KRC as a note creditor for the amount due on the Arctic contract. A matching entry listed the purchased Arctic interest as an asset (App. 911, 913). There was no notation indicating that the obligation was not bona fide. Later schedules filed by Mecom's attorneys described KRC as a creditor, without qualification (App. 934, 949).

The Mecoms signed and swore to a schedule of executory contracts, dated December 15, 1970, in which the terms of the KRC Arctic agreement were described in considerable detail. The purchased interest was characterized as a "working interest in certain designated permits as set out fully in the contract" - a statement under oath in a short (four page), readable document, which necessarily refuted any allegation of a side agreement

(D.Ex. W) (App. 938) (emphasis added). Two of the seven executory contracts listed on this schedule, but not the Arctic contract, were specifically designated in the document as "not recognized . . . as subsisting and enforceable contracts or obligations . . ." (App. 940). If the Arctic contract had not been a "real deal", as Mecom testified six years later, it certainly would have been listed as a questionable obligation. Indeed, other papers make it clear that Mecom's attorneys were contesting any contract they could (D.Ex. X) (App. 942-46). They did not challenge the Arctic agreement, listing the "King Resources Canadian Leases" as assets (D.Exs. Z, AA, DD) (App. 957, 994, 1015, 1089).

Apparently in February, 1971, Mecom shifted his position and found grounds to attack the KRC contract. He still made no claim, however, that the contract was a sham. Instead, in a summary of assets and liabilities filed February 12, 1971 (D.Ex. AA) (App. 989-1052), the contract was acknowledged and a note indicated an intention to "negotiate" for its "cancellation" (App. 1015).

The transcript of the first meeting of creditors on February 24, 1971 (D.Ex. BB) (App. 1053-67), also refers to an intention to challenge the KRC contract, but no reason was given (App. 1063). The transcript is significant chiefly because it shows that avoidance of the KRC Arctic contract would have been of great importance to Mecom. It was by far the largest claim against Mecom personally, and its disavowal would have greatly

improved his financial position. If the contract were really a sham, Mecom would certainly have told his lawyers. The transcript also indicates that Mecom's liquidity was significantly better than he stated in his trial testimony when he claimed he did not have funds to enter into the Arctic contract (Tr. 925-26; App. 1053-67).*

The eventual assignment by Mecom of his Arctic interest to the Colorado Corporation (D.Ex. CC) (App. 1077-82) treated the Arctic agreement as a bona fide obligation which had become disadvantageous to Mecom; the description of KRC's claim against Mecom was unqualified.

Nowhere in any of these ten 1970-71 documents, many sworn to and signed by Mecom himself, was there any mention of any side or buy-back agreement; nowhere is there a hint that Mecom did not consider the Arctic contract "a real deal" when he entered into it.

3. The Trial Court's Ruling

Towards the end of Mecom's cross-examination, the documents from his bankruptcy proceedings, properly authenticated under the seal of the federal district court in Texas, were offered in evidence. The documents were obviously admissible as authenticated prior inconsistent statements and, after the defense explained that they were being offered for this purpose, the Government

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* Most of the statements at this hearing were made by Mecom's attorney and specifically adopted by Mecom, testifying under oath.

raised no objection, asking only for time to examine them (App. 1367).* The Court had no difficulty at this point accepting the documents in evidence and did not even think it necessary to grant the Government's application for a voir dire (App. 1371).

However, defense counsel's questioning of Mecom regarding the documents never got beyond a preliminary stage. Counsel had done little more than identify the documents when Mecom interrupted twice, objecting crustily to relevance and invasion of his privacy and volunteering at some length the view that his bankruptcy had no "bearing on any business with King" and he didn't see the "point", or the "connection" of the questioning (App. 1368, 1372-73). The Court sided with the witness, stating somewhat impatiently, in front of the jury: "[The bankruptcy] has at most a limited interest to us . . ." (App. 1372-73). Counsel was urged to accelerate his questioning and was informed firmly, "we are not going to explore the bankruptcy at any length" (App. 1373). The Court had previously hurried counsel in the jury's presence, during the examination of Mecom on this subject (App. 1371-73). Since the bankruptcy documents were in evidence and on their

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* Relevant entries and pages had been marked and were shown to the prosecutor. Prior to trial, the prosecution had examined the full court file in Texas, and had obtained copies of many of the documents for itself (App. 1367, 1370, 1402).

face inconsistent with Mecom's key testimony, counsel deferred to the Court and desisted in cross examining Mecom. Unless the prosecutor were to go deeply into the matter on re-direct examination, it would suffice to read the contradictory documents to the jury and make the appropriate arguments that Mecom's trial testimony about there being "no deal" should be rejected.

The prosecutor did, indeed, inquire extensively and skillfully about the documents. Approximately 12 of the 20 pages of re-direct transcript were devoted to the subject. The prosecutor painstakingly inquired about each document in each exhibit, eliciting the not surprising testimony that Mecom had nothing to do with the physical preparation of any of them (App. 1377-88). The prosecutor avoided questions as to Mecom's actual knowledge of the documents, and was particularly circumspect when dealing with documents to which Mecom had sworn. As a result, the cumulative impression created by this repetitive examination was that Mecom had only a casual interest in his bankruptcy and had no concern for or knowledge of statements about the Arctic contract. The jury must have felt, as the Court stated, that the prosecutor's examination "elicits what presumably everybody would have known, that supposedly takes the sting out of this material from the Government's point of view . . . " (App. 1404).

It was obvious that reliance on the bare documents was no longer possible and defense counsel must cross-examine Mecom thoroughly in order to rebut the impression left by the

prosecutor's questioning.*

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* Subjects for cross-examination would include the following: (1) In the first meeting of creditors on February 24, 1971 (D.Ex. BB) Mecom's lawyer, in remarks adopted by Mecom in sworn testimony, described the Arctic contract as the largest and most important liability in the bankruptcy proceeding, without which there would be a relatively insignificant amount of unsecured debt (App. 1063). Contrary to his redirect testimony, would not Mecom have focused his attention on this most important element in his bankruptcy? (2) Since his lawyers were actively contesting contracts (D.Ex. X, W) which they considered vulnerable to attack (App. 940, 942-46), and since they discussed with Mecom which claims in his bankruptcy to dispute (App. 1390), would Mecom not have mentioned to his lawyers that his most pressing obligation, the Arctic contract, was a sham? (3) Would it not have been particularly logical for Mecom to talk to his lawyers about the Arctic contract since they were attempting to avoid it on other grounds? (D.Exs. AA, BB) (App. 994, 1015, 1062-63). (4) The prosecutor's careful questioning on re-direct about Mecom's not "preparing " documents (App. 1377-88) did not cover, as defense counsel would have, whether Mecom remembered the documents, discussed them at the time with his lawyers, or had any other conversations with respect to them. Those documents which were signed or sworn to by Mecom (D. Exs. U, W, AA, BB) would be particularly open to further questioning. (5) Mecom testified on re-direct that he "may" have discussed the Arctic with his bankruptcy lawyers but did not remember (App. 1378). Defense counsel would have liked to attempt to refresh his recollection. (6) On May 21, 1971, Marriott wrote to counsel for Mecom's co-receivers explaining in considerable detail the background of the Arctic contract (D.Ex. CC) (App. 1074-76). The letter which was intended to be submitted to the court set forth the terms exactly as they were contained in the written contract, with no mention of a side agreement, and described the controversial $275,000 payment precisely as King, not the Government, interpreted it (App. 1074-76). Mecom testified on re-direct that he did not recall talking to Marriott about the letter but, "if Marriott asked me any questions I answered them" (App. 1380). Defense counsel would have liked to explore how unlikely it would be for Marriott to send such a letter without consulting Mecom. (7) Mecom testified on re-direct that he had nothing to do with the assignment of the Arctic contract included in D. Ex. CC. This testimony conflicted with the representation in Marriott's letter (D.Ex. CC) (App. 1074-76) that the assignment had been discussed with him. (8) Mecom claimed on re-direct that he had nothing to do with preparing three particularly significant documents (D. Exs. U, W, AA), and implied that he knew nothing about the relevant statements about the Arctic contract contained in those documents (App. 1384, 1386, 1388). In each of the three documents he signed a "solemn oath" affirming the truth of the statements made therein. He was not asked on redirect about these oaths or about his understanding of the significance of making them. Defense counsel would have liked to have done so.

At this point, the prosecutor moved to exclude the exhibits (App. 1389). In a short voir dire Mecom conceded that he had in fact read "most" of his documents before signing them, that the attorneys who prepared the documents had consulted with him about them, and that he had discussed with his lawyers which claims to dispute (App. 1389-91).

Counsel kept this questioning brief, based upon his understanding that a voir dire was properly to be used only for questions of admissibility.* Further substantive inquiry must await re-cross examination (App. 1400).

However, no such opportunity was ever afforded. At this point the Court angrily interrupted, struck all the exhibits from the record and directed the jury to disregard them (App. 1392). Characterizing the exhibits as having "modest potential relevance" (App. 1404), the Court apparently took belated offense at counsel's failure to question the witness extensively about them when they were offered. This reaction was inexplicable, since the Court's reaction to the cross-examination at that time had been one of impatience, ordering counsel to "move along" (App. 1370, 1372). Now he berated counsel, complaining that "the only enlightenment that

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* Actually, no voir dire was necessary with respect to some of the most significant documents (D. Exs. U, W, AA, BB,). As signed, sworn to and properly authenticated statements, inconsistent with Mecom's direct testimony, they were clearly admissible regardless of what Mecom claimed by way of explanation. Fed. R. Evid. 801(d)(1)(A); 613(b).

the jury gets about that thick sheaf of papers has to be supplied by the Government [on] redirect" (App. 1392).

The Court was also apparently bothered by the possible effect on the jury of the documents' "red seals and ribbons" (App. 1403-04). These were, of course, the necessary accoutrements of authentication required by the rules. Fed. R. Evid. 902(4); 1005.

The prosecutor went on to finish his re-direct examination and defense counsel then attempted to cross-examine Mecom regarding his statements in the bankruptcy proceedings. The Court refused to permit it, saying "I will not allow anything further on that" (App. 1400) ". . . you [already have had] every opportunity to do what is necessary to show that the jury should be regaled by those red ribbons and things . . ." (App. 1404). Counsel was not only forbidden from examining Mecom on the issue, but also was rebuffed in an attempt to re-offer the documents through Mecom (App. 1399-1405). Finally, counsel was interrupted in mid-sentence and told "I don't want to hear any more on this" (App. 1404-05). Mecom was excused.

Defense counsel later attempted to raise the issue as part of the defense, but the Court ruled that Mecom could not be called as a defense witness for the purpose of questioning him about the bankruptcy exhibits (App. 1326).

Finally, on the last day of the defense case, in the flurry of last minute business, and after receiving assurances

that Mecom would not be called, the Court allowed a single document to be admitted in evidence without any witness being examined in regard to it (D. Ex. W) (App. 936-41). Two other exhibits (D. Exs. AA and CC) (App. 989-1052, 1068-82) had already been admitted via other Government witnesses appearing after Mecom, but the Court's ruling had effectively prohibited cross examination of Mecom with respect to any of these documents, and Mecom's re-direct testimony, denying involvement, went unchallenged throughout the trial.

In his summation the prosecutor built upon the testimony he had elicited from Mecom during re-direct examination prior to moving to exclude the documents. He was able to state, without fear of contradiction in the record:

> "Well, you may recall Mecom's testimony about how those bankruptcy documents were handled. The testimony very basically was they were prepared by somebody else, he signed them, period. You may infer that maybe the lawyers got some help from Mecom's accountants and the other people who worked with him and knew what contracts he had" (Tr. 4469-70).

To jurors who had heard the Court belittle the importance of the documents and who did not know that avoidance of the Arctic contract was the most important issue in Mecom's bankruptcy, or that other contracts had been disavowed but not this one, this argument must have seemed plausible. The inference, requested by the prosecutor, that Mecom had no responsibility for sworn statements flatly contradicting his trial testimony on a key issue, was one that the Court's rulings had left the defense powerless to rebut.

B. The Court Committed Reversible Error In Denying Appellants The Right To Cross-Examine Mecom About Statements Made In His Bankruptcy.

There were two permissible ways for defense counsel to make use of the Mecom bankruptcy documents - confronting Mecom on the stand and reading the documents to the jury. Faced with pressure from the trial court to expedite the questioning (App. 1368-72), counsel first decided to rely primarily on the latter technique, planning to read the relevant portions of the documents to the jury as soon after Mecom's testimony as possible.* The compelling need for substantive cross-examination arose only when the prosecutor questioned the witness at great length on re-direct about the documents, firmly planting in the minds of the jurors the erroneous impression that Mecom was innocent of involvement with any of them.

There cannot be any right more fundamental to criminal justice than a defendant's right to confront and cross-examine the witnesses against him. U.S. Const. Amend VI; Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931).

Mecom was the principal in the most important transaction in the case and testified about the central issue to be

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* The documents were not read during or immediately following cross-examination, as they normally would have been, because the prosecutor had requested time to review them first (App. 1367).

decided.* The defendants had the basic right to challenge his credibility through his directly contradictory prior statements.

> "It is well established that in criminal cases great latitude is generally permitted in the cross-examination of a prosecution witness in order to test his credibility, especially as to any prior inconsistent statement which could be used in an effort to impeach him." McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968).

See also United States v. Feldman, 136 F.2d 394, 397 (2d Cir. 1943), aff'd, 322 U.S. 487 (1944).

While recognizing the trial court's customary discretion in regulating cross-examination, the appellate courts have repeatedly stressed the need for significant latitude where a witness's credibility is challenged and have found reversible error where such latitude has been denied. District of Columbia v. Clawans, 300 U.S. 617, 632 (1937) (Stone J.); United States v. Haggett, 438 F.2d 396, 399-400 (2d Cir.), cert. denied, 402 U.S. 946 (1971); United States v. Wolfson 437 F.2d 862, 874-75 (2d Cir. 1970); United States v. Lester, 248 F.2d 329, 334 (2d Cir. 1957).

As a matter of fact, until a party is afforded the opportunity "substantially to exercise the right of cross-examination" with respect to relevant material, the trial court has no discretion at all to limit such questioning. J. E. Hanger,

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* The importance of Mecom as a witness was underlined by the Government's protectiveness of him. Although bringing him to New York five times for interviews (App. 1349-50), the prosecutor assisted Mecom in avoiding defense counsel's pre-trial attempts to speak to him (App. 280).

Inc. v. United States, 160 F.2d 8, 10 (D.C. Cir. 1947); Grant v. United States, 368 F.2d 658, 661 (5th Cir. 1966); see United States v. Mahler, 363 F.2d 673, 677 (2d Cir. 1966). In this case, the trial court's actions resulted in defense counsel's being completely barred from cross-examining Mecom with respect to a group of highly pertinent prior statements directly affecting his credibility.

The limitation on cross-examination was particularly inappropriate since a number of the most significant documents (D. Exs. U, W, AA, BB) (App. 911, 913, 938-40, 994, 1015, 1062-63, 1066) were not only admissible for impeachment purposes but, since they were sworn, were also competent as substantive proof. Fed. R. Evid. 801(d)(1)(A). The trial court's discretion with respect to limiting cross-examination is much narrower than usual when the examination relates to the substantive issues of a case. Clawans, supra, 300 U.S. at 62.

The effective denial of defense counsel's right to cross-examine Mecom on his bankruptcy statements was not ameliorated by counsel's opportunities to examine Mecom during the original cross-examination and on voir dire. The need for questioning on the subject did not arise until after the original cross-examination, when admission of the document had been unexpectedly rescinded and the prosecutor had explored the subject extensively on re-direct. The voir dire was limited to matters of admissibility. Defense counsel had no way of knowing, either

during the initial cross-examination or during the voir dire, that the Court would arbitrarily reverse itself and forbid both the documents and all inquiry about them.

Even when a considerable amount of substantive cross-examination has taken place, it is error for a trial court arbitrarily to cut off questioning with respect to prior inconsistent statements, particularly where the jury is erroneously admonished, as it was in this case, to disregard the previously admitted evidence. United States v. Barash, 365 F.2d 395, 401 (2d Cir. 1966).

C. The Court Also Committed Reversible Error When it Changed its Ruling on the Admission of the Documents that had been Admitted into Evidence.

There can be no serious argument as to the relevancy of Mecom's statements in his bankruptcy regarding the KRC Arctic contract. They directly contradicted the most important aspect of his testimony. All the documents were admissible for impeachment purposes as prior inconsistent statements (Fed. R. Evid. 613(b)) and four of them, those to which Mecom swore (D. Exs. U, W, AA, BB) (App. 911, 913, 938-40, 994, 1015, 1062-63, 1066) were competent as substantive proof. Fed. R. Evid. 801(d)(1)(A).

The Court below readily agreed, in the first instance, with the relevance and propriety of the documents. After defense counsel explained the significance of these exhibits, the Court

quickly admitted them. Indeed, he denied the Government's request for a voir dire: "As to the admissibility of the papers? No, no. You may cross-examine or redirect or whatever it is" (App. 1369-70).

The Court's reasons for subsequently changing its mind and excluding the documents apparently had something to do with the way in which the documents were offered. There was, however, nothing wrong with the offer. Under the new Federal Rules of Evidence, counsel need only explain to the court the purpose and importance of prior inconsistent statements in order to make them admissible. Fed. R. Evid. 613(b); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶613 [04] at 613-24 -- 613-25 (1975); see United States v. Harvey, No. 76-1183, slip op. at 6033-34 (2d Cir. Nov. 24, 1976).*

Nevertheless, the Court admonished defense counsel for failing to elicit information which the Government sought in its substantive re-direct examination. No rule of law requires a defendant to ask the prosecutor's questions for him, and Rule 613 requires defense counsel to do no more than he did. All future offers to go further and comply with the Court's previously unstated requirements were rejected (Tr. 4035-39; App. 1325-26, 1399-1405).

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* The earlier practice had required the proponent of the evidence to give the witness an opportunity to explain or deny his prior inconsistent statements. Under the new rule the proponent may leave these matters to his adversary and then cross-examine on the matter. This was precisely the procedure followed by the defense here.

The Court's denial of King's later offer to put evidence in as part of the defense case was explained in different terms. Defendant's offer was now to recall Mecom as a defense witness in order to admit the documents and question Mecom about them. The reason for exclusion could no longer be a failure to question the witness satisfactorily, since the offer was to call him back for precisely that purpose. The Court now expressed its concern that Mecom's return would magnify the documents' importance for the jury. Rather than risk that, the Court, while admitting it might have been in error in excluding the evidence, was "disposed to adhere to the ruling" (App. 1326).

D. Subsequent Admission of Certain Documents Did Not Correct The Error.

By the close of trial, three exhibits of the initial offer of ten had been admitted into evidence. Exhibit AA, a schedule of assets and liabilities, was admitted, without Government objection, through Charles Carwile, one of Mecom's bankruptcy attorneys, who testified on the last full day of testimony (Tr. 4112). Defense Exhibit CC, the Mecom assignment, with supporting correspondence, was admitted during Marriott's testimony (Tr. 1064). Exhibit W, the schedule of executory contracts, was admitted on defense counsel's motion at the end of the defense case (Tr. 4039). None of these admissions cured the Court's initial error in excluding the complete set of exhibits, forbidding questioning about them and disparaging their significance.

In the first place, admitting the documents could not restore the opportunity, twice refused by the Court, to cross-examine Mecom about them. The prosecutor's lengthy examination of Mecom on the subject had enabled him to argue that the documents were technicalities prepared by lawyers and accountants about which Mecom knew nothing (Tr. 4469-70; App. 1377-88). Having been forbidden to inquire, defense counsel had no way of making an effective counter-argument to the jury.

The witnesses through whom the documents were offered afforded no substitute. Carwile had nothing to do with the bankruptcy prior to mid-February, 1971 and could not testify about proceedings occurring before that time (Tr. 4113-14). Marriott testified that he was not familiar with the position Mecom took during his bankruptcy regarding the Arctic contract (Tr. 1059). The third document was admitted on the last day without any witness.

Secondly, admitting three of the documents could not cure the improper exclusion of the others because there were aspects of the excluded documents which in no way were duplicated by those admitted. For example, the testimony at Mecom's first meeting of creditors (D. Ex. BB) contains a discussion of Mecom's liquidity situation, indicating that he had sufficient liquid assets to meet all his obligations (App. 1053-67). This is in sharp contrast to Mecom's trial testimony that he had been so strapped for cash that he could not have

participated in the Arctic venture without some kind of side deal (Tr. 924-25; 926-29; 939-40). The excluded transcript also shows that the KRC claim was far and away the largest one against Mecom and that he had every reason to attempt to avoid it if he had any grounds for doing so. Counsel should have been permitted to confront Mecom with this testimony and with other documents (e.g., D. Ex. X) (App. 942-46) showing that less significant contracts had in fact been challenged.

Moreover, the documents, when taken in order as a group, showed a coherent picture of Mecom's developing attitude toward the Arctic contract. Omitting seven of the documents and fragmenting the presentation of others, offering them weeks apart through different witnesses (or none at all), could only confuse the jury as to the documents' relevance to the defense. The prosecutor's argument that Mecom had nothing to do with the few documents which found their way into evidence was strengthened by the absence of other similar documents which showed the extent of the proceedings and demonstrated the likelihood that Mecom must have been involved in the decisions as to which contracts to disavow and which to affirm.

Finally, the tardy acceptance in evidence of some of the Mecom bankruptcy documents was insufficient to overcome the impression on the jury which was created when the documents were first admitted and then excluded during Mecom's testimony. When the trial court struck the documents, he specifically told the jury to disregard them. Before the jury, he denigrated the

significance of the documents, sharply admonished defense counsel and accepted as true and complete the testimony about the documents elicited by the Government in its lengthy examination (App. 1392). When defense counsel asked for permission to argue the point, the Court excused the jury, remarking that two minutes would suffice for the argument (App. 1401). It is difficult to see how the impression made on the jury by these events could have been erased even if the Court had acted promptly to do so. See United States v. Barash, supra.

In United States v. Williamson, 516 F.2d 390 (2d Cir. 1975), this Court approved a trial court's attempt to correct an erroneous limitation on cross-examination regarding prior inconsistent testimony. The trial court changed its mind and on the two next succeeding days, voluntarily gave the defense the opportunity to recall the witness, specifically inquiring and receiving negative replies. In our case, it was the defense which made the repeated but futile requests that the Court change its mind and recall the witness. Although recognizing his possible error (App. 1326), the trial court nevertheless refused to correct it. The tardy admission of a few select exhibits without any opportunity to interrogate Mecom with respect to any of them hardly constitutes the kind of correction this court found to be required in Williamson. See also Battaglia v. United States, 383 F.2d 303, 306 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968).

POINT II

THE GOVERNMENT'S INTENTIONAL PRE-INDICTMENT DELAY AND THE SUBSTANTIAL ENSUING PREJUDICE TO APPELLANTS VIOLATED DUE PROCESS

Both before and after trial appellants moved to dismiss the indictment for wrongful and prejudicial pre-indictment delay. On each occasion, the Court denied the motion without a hearing, erroneously concluding in its Memorandum on Defendants' Post-Trial Motions that appellants had shown neither "intentional delay for tactical advantage nor measurable prejudice", both of which he felt were prerequisites (App. 32). While appellants contend that they need show only that there was intentional delay or actual prejudice, they submit that both elements were present in their case. The Court (i) ignored the Government's concession that the delay had been intentional, and (ii) placed an insurmountable burden on appellants to calculate precisely the harm to their defense, paying inadequate attention to the resultant substantial prejudice detailed by appellants.*

A. The Fact That There Was a Substantial Delay is Undisputed.

The central issue in this case was relatively simple -- whether appellants withheld material information

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* The full extent of the resultant prejudice was set forth in detail in the affidavit of Michael F. Armstrong, submitted 7/22/76 (App. 54-83). Space limitations require that only the most egregious instances of prejudice be selected for detailed discussion herein. Accordingly, we respectfully direct the Court's attention to the aforementioned affidavit so that

concerning certain alleged side agreements with Mecom and COG. Under the Government's theory, the offense was complete in the Spring of 1970. Despite the admittedly intense interest of high Government enforcement officials in both the Arctic revaluation and appellants' roles therein, no SEC investigation was initiated until June 24, 1973. The indictment was not returned until January 20, 1975. By that time, intervening events had made it impossible for appellants to receive a fair trial on these charges.

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* (footnote continued from page 1)

the cumulative effect of all the instances of prejudice to the defense can be appreciated. These included: Lowry's destruction of what he recalled as a signed copy of Government Exhibit 1; the inability of anyone to recall the circumstances surrounding the preparation of what appeared to be a carbon copy of the alleged buy-back agreement with Mecom (Tr. 4083-87, 4138-52, 1469-67); the destruction of Mecom's phone records, which could have confirmed that he spoke with King on February 10, 1970; the "loss" of Marriott's diary, which the defense believed would have shown that Marriott had failed to complain about the failure to execute a side agreement until 1971; the unavailability of KRC board member Neil MacKenzie in light of the January 29, 1971 KRC board meeting (he moved to South Africa approximately 18 months before) (See Boucher brief, pp. 42 through 59); the death of Cowett, who before his death in August 1974 was a target of the SEC's investigation, but after his death was recast as a victim; the death of Eric Scott, the FOF director with the most knowledge of the oil and gas business and who could have refuted the insinuations that KRC ripped off FOF; the death of Walter Montague, a Mecom employee, who could have confirmed Boucher's testimony as to the circumstances of Mecom's failure to be awarded the contract for drilling in the Arctic; the dimmed recollections of numerous witnesses, particularly Hulsey, Lowry, Mecom, Marriott and appellants themselves which are detailed in the affidavit; the dimmed recollections concerning the February 10, 1970 telephone conversation between King and Mecom, and the preparation of King's memorandum of that conversation which, if believed by the jury, would have required an acquittal; and the general unavailability of numerous documents to the defense.

As the SEC's chief investigator acknowledged below, "[t]he Arctic sales and revaluation were the subject of intense public and private scrutiny in 1970 and early 1971," and one or more articles either questioned the impact that the revaluation had on FOF's net asset value, asked whether IOS had inflated the value of the Arctic permits, or referred to the Arctic sales as "controversial" (App. 606-07). The most significant public report was the one appearing in the Wall Street Journal on May 20, 1970, erroneously quoting Harry Trueblood, COG's President, as having asserted to a news reporter that there was some kind of secret buy-back agreement between COG and KRC (App. 1102-03).

As a result of the publication of this article, appellants were questioned about the Arctic transactions by the SEC in the Spring of 1970. Boucher was interrogated directly via telephone by Stanley Sporkin, the SEC's Director of Enforcement (App. 147, 159). At that time, both the press and the SEC were concentrating on the Arctic transactions because one of the two purchasers relied upon for revaluation purposes was reported to have said that it had some kind of buy-back arrangement with KRC. Sporkin admittedly "had a strong interest in the Denver SEC office's investigation of John King and related companies" (App. 243).*

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* The Denver SEC office was engaged from 1973 to 1974 in an intensive investigation of King's activities. A Grand Jury was convened in 1973 to consider the evidence that was being collected. This Grand Jury disbanded in 1974 without voting any indictment.

Several months thereafter, the SEC received specific allegations with respect to the non-arms length character of the Mecom transaction, the other sale upon which the revaluation had been premised. On February 17, 1971, Arman Frederickson, then a director of KRC, told John Kelly of the SEC's Denver office that the Arctic transactions had involved undisclosed side deals which had not been reflected in the contracts (App. 180-83). At that early stage, Frederickson charged, as the Government would eventually charge some four years later, that the money for Mecom's purchase had come from King and that King had furnished this money to establish a market price for the Arctic properties. A copy of the memorandum of this interview was sent to Sporkin at the time (App. 1199-1201).

Approximately three weeks later, on March 10, 1971, Frederickson met again with Kelly. Kelly's memo of that meeting, a copy of which was also sent to Sporkin at the time, recounted, inter alia, the following allegations: (1) there was a side agreement for King to provide Mecom's down payment, drilling work to cover Mecom's subsequent payments, and a buy-back; and (2) there was a side deal for KRC to purchase valueless property from COG in return for its Arctic purchase (App. 178-79).

At the March 10, 1971 meeting, Frederickson displayed four documents which he claimed supported the first allegation and upon which the Government placed its greatest reliance at trial: (a) Lowry's handwritten note, which was the first part of Government Exhibit 1; (b) the other half of Government Exhibit

1, an unsigned buy-back letter to Mecom; (c) a letter from Marriott to Frederickson purporting to describe the alleged side agreement between King and Mecom (App. 816-17); and (d) a copy of the $275,000 check payable to Mecom (G. Ex. 6L) which Mecom allegedly used to make his down payment on the Arctic contract (App. 178). Again, Sporkin received a copy of this memo at the time, which he acknowledges having read (App. 242-43).

There can be no doubt as to the critical significance to the Government's theory of the case of the documents displayed to the SEC by Frederickson at that early date. The prosecutor charged in his summation that these documents, and particularly Government Exhibit 6H (App. 816-17), were the reasons why an indictment was returned against these defendants four years later (Tr. p. 4328).*

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* Appellants were unaware of Frederickson's 1971 interviews with the SEC when they moved prior to trial to dismiss the indictment because of prejudicial pre-indictment delay. The Government did nothing to enlighten the district court as to these matters. The prosecutor simply averred that he had been informed by Sporkin that the latter had spoken with Boucher on the telephone in May 1970, at which time Boucher did not inform Sporkin of his fraudulent conduct, and that the SEC investigation did not commence until the Summer of 1973 (App. 158-59). The clear implication of Sporkin's statements was, contrary to fact, that he had been unaware of any allegations of fraud in connection with the Arctic revaluation until mid-1973. When the Frederickson interviews were cited by appellants in their post-trial motions, Sporkin explained that he had forgotton about them (App. 243).

The Government's failure to take timely action in the face of these allegations is all the more remarkable when it is realized that far from receding from the public eye, the Arctic revaluation retained its prominence, primarily as a result of the widespread publication in April, 1971 of a book entitled "Do You Sincerely Want to Be Rich"

On April 13, 1972, the Government again received allegations concerning the Mecom transaction.** On that date, Marriott called John S. Pfeiffer, counsel to KRC's bankruptcy trustee, and relayed to Pfeiffer the same information he had given Frederickson. (App. 288-89). Pfeiffer reported this conversation to Judge Fred M. Winner, to whom the KRC reorganization had been assigned, and Judge Winner, in turn, informed James Treece, the United States Attorney. The three men met in Judge Winner's chambers for approximately 1-1/2 hours discussing Marriott's information about the Arctic contracts (App. 288-90). Treece referred the matter to Kelly in the SEC's Denver office -- the very same person who had interviewed Frederickson one year earlier about the very same charges (App. 296-97).

Questions about appellants' roles in the Arctic revaluation were yet once more brought to the SEC's attention in 1973. The then recently appointed attorneys for FOF's corporate successor met with the SEC, presumably in an attempt to obtain its support in their efforts to recover damages

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* (footnote continued from previous page)

(App. 608). The SEC investigator in this case acknowledged that this book's allegations with respect to the Arctic revaluation, together with other press coverage at that early time, ". . . made the Arctic transaction a natural focus" of an SEC investigation (App. 595).

** Civil litigation charging that appellants had made certain false and misleading statements about the Arctic transactions had already been commenced in September 1971. Dietrich Corp. v. King Resources Co., Docket No. C-3424 (D. Colo., filed 9/20/71).

from KRC on a variety of claims. These attorneys had met in Denver with none other than Frederickson, who apparently had repeated the same story and had displayed the same documents (App. 246-47). On June 11, 1973, these attorneys discussed this information again with Sporkin (App. 248) at a meeting in Washington. This was the third time that Sporkin had been advised of these matters. This time, however, an SEC investigation of Frederickson's charges resulted (App. 243-44), staffed almost exclusively by one investigator, who had other responsibilities involving IOS and Vesco during the same period of time. Despite what appear to have been part-time efforts, the SEC made a criminal reference approximately 15 months later, whereupon the matter was presented to a grand jury in this district, rather than in Denver. The key evidence against appellants remained (i) Marriott's tale, with accompanying documents, as told by Frederickson, and (ii) the Wall Street Journal article which paraphrased Trueblood's remarks.

For three years the Government had watched and waited and the decision not to move ahead was deliberate and tactically motivated. The prosecutor explained that the Denver SEC office was too busy with other investigations relating to King to pursue the Arctic (App. 222). Kelly, who had become aware of the Arctic information early in 1971, attempted to justify the delay on the ground that he merely intended to use the Arctic data as evidence of similar acts in the prosecution of the other matters.

More than 4 years after the Government first had sufficient evidence against King to obtain an indictment on the Arctic revaluation, and after the nonArctic matters which supposedly were more important to pursue had failed to result in any criminal charges, the case against appellants was turned on its head and transported across the continent to New York, where appellants were least able to defend themselves.* The Arctic revaluation then assumed center stage, and all the other irrelevant matters that could possibly have prejudicial value against King, but which had not resulted in any indictments in Denver, were denoted as "similar acts" or were termed relevant to the issues of "motive" or "intent".

B. The Government's Delay Substantially Prejudiced the Defense.

The most significant prejudice to the defense was the loss of key defense witnesses and irreplaceable documentary evidence which had not been under appellants' custody or control. In each instance, the prejudice occurred beyond the time that it is reasonable to assume this case could have been brought

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* In addition to the items of prejudice caused by the substantial pre-indictment delay, appellants experienced unwarranted hardships by reason of Government's improper "forum shopping" for venue in this district. None of the critical events involving appellants took place in New York. Virtually all the witnesses were from elsewhere, and most of them never participated in any operative events in New York. The sales transactions, the properties, and the corporate entities which were the principals to the transactions were far removed from the district of prosecution, as were the massive quantities of documents which the Government had been examining for five years and which were now needed by the defense. Although Judge Frankel had denied the defense's pre-trial motions for a change of venue, after several weeks of trial it became clear to the court that ". . . the trial should really have been held some place else" (Tr. 2620).

to trial had the Government not procrastinated.*

1. Cowett's death. At trial, Edward Cowett was portrayed as the principal victim of appellants' alleged deceptions. As the FOF executive primarily responsible for the initiation and review of the KRC/FOF relationship, Cowett was shown to have approved of all purchases by FOF from KRC and to have directed the partial sale of FOF's interests in the Arctic permits -- the pivot around which this prosecution evolved (Tr. 268-70). If alive at the time of trial, Cowett could have contradicted a significant number of allegations of wrongdoing charged by the Government. But Cowett died in August 1974.**

Throughout the presentation of its direct case, as well as the cross examination of appellants, the Government continuously sought to establish instances where FOF, and especially Cowett, had been deceived (App. 66). The Government's intention was obvious: while the case should have been strictly limited whether there were any secret side agreements made with Mecom and COG, the Government feared that it could not prove that any such commitments had been made unless it were able to attack the integrity of the entire KRC-FOF relationship. Accordingly, under the guise of establishing "motive", the Government sought to poison the jurors' minds against appellants by distorting the relationship

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* As noted earlier, the complete details of the resultant prejudice are set forth in Armstrong Affidavit 7/22/76, at pp. 15-44 (App. 54-83).

** Prior to his death, Cowett, far from the alleged victim, was the principal target of the SEC investigation which led to the indictments in this case (App. 65).

between KRC and FOF, depicting it as having been fraught with deception. By this line of attack the Government sought to convince the jury that from 1968 on appellants had systematically defrauded the "FOF bank" with "lies" instead of "guns" (Tr. 4259-68; App. 1344F).

Cowett's testimony could have assisted appellants in rebutting the Government's allegations on these highly prejudicial matters. Not only would he have aided appellants' substantive defenses, but also his testimony would have significantly enhanced appellants' credibility. It is probable that the appellants would have been able to demonstrate, and that Cowett would have admitted under oath, that both he and Bernard Cornfeld had been well aware of the manner in which KRC was selling properties to FOF, and that he had encouraged KRC to proceed on that basis. This was precisely the conclusion reached by the independent KRC trustee in his written report to the bankruptcy court in Denver, dated October 10, 1973. (App. 189-214).

The defense and the Government disagree as to the contents of the testimony that Cowett was never able to give. There is no doubt, however, that Cowett played the principal role on behalf of FOF. We submit that the conclusion of KRC's bankruptcy trustee demonstrates convincingly that it is more reasonable to suppose that Cowett would have aided the defense, rather than the prosecution.*

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* Appellants succeeded in admitting into evidence portions of Cowett's July 1970 testimony before a New York grand jury (concerned with other matters) in which he evidenced a detailed knowledge of the Arctic and the 1969 valuation sales (Tr. 3876-4002). At that time, however, he was not questioned about or challenged as to the bona fides of these sales.

Under similar circumstances, where there have been disputed predictions as to what a material deceased witness would have testified to had the trial not been delayed by the Government, two federal district courts have found sufficient prejudice to require dismissal. United States v. Heckler, No. 74 Cr. 1126 (S.D.N.Y. June 21, 1976); United States v. Wilson, 357 F. Supp. 619 (E.D. Pa. 1973), aff'd without opinion, 517 F.2d 1400 (3d Cir. 1975).

In neither Heckler nor Wilson was there any assurance that the deceased witness would have exculpated the defendants. Indeed, in both cases the Government contended, as the prosecutor has here, that the deceased would have aided the prosecution. Yet both courts dismissed, stressing that since the delay had been caused by the Government, any speculation as to how the deceased would have testified must be taken against the Government.

2. Critical documentary evidence was lost. Appellants were also prejudiced by lost documentary evidence bearing directly on the central issues in the case. Government Exhibit 1 was an unsigned document which the Government argued evidenced King's buy-back agreement with Mecom. This was the only piece of documentary evidence which purported to be a buy-back agreement executed by King. It was allegedly executed by King and placed in Lowry's safe. According to Lowry's trial testimony, Government Exhibit 1 remained there until January 1972 when, in the course of moving his office, Lowry discovered it, determined that it was out-of-date and destroyed it (Tr. 1402-08).

The existence of this document in executed form and, if it ever did so exist, its precise terms and date of preparation were the key issues at trial.*

On March 10, 1971, when the SEC saw Government Exhibit 1 and, therefore, knew that a signed copy of a Mecom buy-back was supposed to be then located in Lowry's safe, the SEC could have either obtained the document or determined that it did not exist. This simple step would have resolved a critical issue which was the subject of conflicting testimony and conjecture at trial. Lowry had volunteered under oath in February 1972, only one month after he allegedly destroyed the signed copy of Government Exhibit 1, that such an agreement had been discussed but had never been executed (App. 1251-55). On another occasion Lowry had testified under oath that he himself might have signed Government Exhibit 1 (App. 1259). Of course, if that had been the case, Lowry would have had a significant personal interest in shifting the responsibility to King, who denied that he had ever signed Government Exhibit 1 (App. 1331) or had discussed any similar arrangement with Lowry prior to February 1970 (App. 1330). At trial, Lowry was at a loss to explain the inconsistencies between his prior sworn testimony and his trial testimony. Had the Government not delayed proceeding with this case, issues which arose at trial in connection with Lowry's actions could have

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* King testified that he discussed the possibility of a buy-back agreement with Mecom in February 1970 (App. 1327-28) and Judge Frankel instructed the jury that any such after-the-fact arrangement could not support a conviction (App. 1447).

been decisively determined on the basis of documentary evidence and recent recollections.

Another significant instance of prejudice involved reporter James Tanner, author of the Wall Street Journal article concerning COG's involvement in the Arctic sale and the sole witness in any way supporting the existence of a buy-back agreement between KRC and COG. Tanner testified that his article had been based upon a telephone interview in May 1970 with Harry Trueblood, president of COG, in which Trueblood had said that he could turn the property back to KRC at will (Tr. 2571). This statement, however, did not purport to be a direct quote, and Trueblood explained at trial that any such statement (which he did not recall making) could only have related to his dissatisfaction with KRC's performance under the contract and his belief that he had sufficient legal bases for voiding the deal if he so desired (Tr. 1738-40). He emphatically denied that there was a buy-back agreement (Tr. 1833-34, 1847). Tanner had no specific recollection of his conversation with Trueblood and, by the time of trial, no longer possessed his notes relating to this conversation (Tr. 2571, 2576). Thus, the entire matter rested upon speculation and reconstructed memory. Nevertheless, the newspaper article, representing the only affirmative evidence of a buy-back agreement, was read to the jury as if it were reliable proof. Prompt investigation by the SEC would have secured Mr. Tanner's fresh recollection, and in all likelihood his notes of his telephone interview with Trueblood.

3. Impaired recollections. The testimony of Trueblood and Lowry also illustrates the prejudice suffered by appellants from the impaired recollections of both defense and Government witnesses. While we recognize that a general claim of hazy recollection has been held to be an insufficient showing of prejudice, United States v. Foddrell, 523 F.2d 86 (2d Cir.), cert. denied, 423 U.S. 950 (1975), specific instance of failed and faulty memory can be shown.* There were a number of witnesses in addition to Trueblood and Lowry (including Hulsey, Mecom and Marriott) who either testified in a manner which differed significantly from testimony previously given by them under oath or who simply could not recall the specifics of events which had transpired many years before. Curiously, in all cases the earlier testimony had been more favorable to the defense than as given at trial.

4. Other Prejudice. Finally, the longer the government waited, the less able appellants were to prepare an adequate defense. Prompt investigation would not only have alerted appellants to the need for assembling evidence at a time when they had much greater access to the pertinent KRC documents, but also the defense could have been prepared at a time when both defendants had resources available which have since been depleted. In 1971 and 1972, Boucher was still president of KRC. Appellants could have conducted the same kind of file searches that the SEC conducted. That kind of access to relevant

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* The Court's attention is respectfully directed to pages 38-41 of Armstrong Affidavit, 7/22/76 (App. 77-80), for detailed description of the prejudice suffered in this regard.

materials, however, became impossible once Boucher was no longer with KRC.

Even more pernicious motives may well have been at work, for it is clear that the longer the Government delayed its Arctic investigation, the easier its job was bound to be. By its delay, the Government was in a position to benefit from facts and documents discovered during the course of numerous civil litigations, one of which had been commenced as early as 1971. In addition, the Government gathered or could have gathered various documents and facts relating to the Arctic revaluation and certain collateral matters from the bankruptcy proceedings involving both King individually and KRC and its related companies, in which the Government was an active participant.

Both appellants are defendants in numerous civil litigations, and the IRS has brought substantial claims against King and his family (App. 187-88). King filed personal bankruptcy in June 1971 and has been adjudicated a bankrupt; Boucher has suffered considerable financial hardships. After years of litigation and untold expense, both appellants have been relegated to the position of pro se defendants in most of the litigations. Indeed, their civil adversaries are in possession of most of the documents in this case and have not felt obliged to cooperate with defense counsel. For example, at the time Boucher left KRC, the documents were almost exclusively under the control of KRC's trustee in bankruptcy, whose

interests were, in many instances, opposed to appellants'. As a result, the defense in this case was forced to rely primarily on a review of the documents which the Government had selectively culled for its own use from the various files -- a thoroughly unsatisfactory situation.

C. The Government Cannot Escape Responsibility for the Consequences of its Own Intentional Delay.

The Court conceded that the basic information supporting the indictment had been available to both the SEC and the Justice Department long before any criminal investigation commenced, but he excused the delay for the apparent reason that appellants had failed to establish that the delay had been "maliciously occasioned" (App. 175), or at least had not been the product of "devious or otherwise improper conduct" (App. 30). Appellants submit that the standard is otherwise. All that must be shown is that the Government consciously delayed taking action to suit its own tactical or strategic advantage. That test is met here, where although aware of allegations of serious wrongdoing by appellants, high Government authorities decided that the Government's supposed interests vis a vis appellants would be better served by placing the Arctic to one side until the day when they could be used in furtherance of the Government's positions in other actions, or as the independent basis upon which to seek a conviction if its other efforts proved unsuccessful.

The cases are basically silent on the question of what constitutes the kind of pre-indictment delay that will be a sufficient basis upon which to dismiss an indictment. In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court spoke in general terms of the need to ascertain whether the "Government intentionally delayed." (404 U.S. at 325). As shown above, the Government has, in effect, conceded that its delay was intentional. In decisions subsequent to Marion, this Circuit has not had occasion to discuss this question in any detail, although "contrived procrastination" was referred to by the panel in United States v. Eucker, 532 F.2d 249, 255 (2d Cir. 1976). We have not found any authority which supports Judge Frankel's position that the delay must have been "maliciously occasioned".

Obviously, those who have been responsible for years of delay will be the last to admit that their actions were "contrived" or "maliciously occasioned". At least in the absence of a hearing -- which the Court denied -- the essential question should be whether the objective facts concerning the delay will permit the consequences of the Government's procrastination to redound to its benefit.

> "In view of the extreme difficulty of defendant in proving by competent evidence an intent by the government to secure tactical advantage by the delay, we can only adopt the adverse inference from its conduct, particularly in view of its failure to come forward with any reason to explain the delay." United States v. Harmon, 379 F. Supp. 1349, 1351-52 (D.N.J. 1974).

The same result should govern when the reasons proffered by the Government to justify its procrastination

are insufficient, as they are in this case. The Government has attempted to excuse its delay by asserting that its investigators were preoccupied with two other investigations in Denver relating to King (App. 222). Consequently, "the Arctic was sort of left in a side box and not pursued." (Tr. 2735). Yet when the Arctic revaluations were removed from this Denver "side box" in mid-1973, the matter was assigned part-time to an SEC investigator from Washington who conducted other investigations simultaneously. The resulting criminal reference was made to the U.S. Attorney in this district. The Government has failed to supply any reason why a part-time investigation conducted by a Washington attorney in a case referred to New York could have been justifiably delayed in any way because the Denver SEC office was busy with other matters. The facts that this case was tried in the Southern District of New York eloquently demonstrates that despite the Government's disclaimers, its actions have been motivated throughout primarily by tactical considerations or strategic decisions.

While certain securities fraud cases may engender delay because of the complexities of the subject matter, United States v. Benson, 487 F.2d 978, 986 (3d Cir. 1973), the Government's ability to obtain an indictment 1 1/2 years after a single investigator had been assigned this case on a part-time basis proves that this factor was not present in our case.

D. Under The Circumstances Of This Case The Government's Procrastination Deprived Appellants Of A Fair Trial

Even the Government was prepared to concede in the landmark case of United States v. Marion, supra, that dismissal of an indictment is required where there is both intentional delay and actual prejudice. 404 U.S. at 324. Both these elements were present here.

Moreover, the confines of the Government's reluctant concession in Marion did not represent the only circumstances under which relief is mandated. The Court's actual ruling in Marion was considerably more circumspect:

> "[W]e need not, and could not now, determine when and in what circumstances actual prejudice resulting from preaccusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution. To accomodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case." 404 U.S. at 324-25.

A "delicate judgment" as to the impact of the Government's delay in this particular case demands a reversal of the convictions. In the first place, the pre-indictment delay was substantial. Secondly, there was no justifiable excuse for this prolonged delay. Thirdly, the delay resulted in actual prejudice to the defense by reason of deceased witnesses, lost documents, dimmed recollections and substantial changes in

appellants' personal circumstances which rendered them considerably less able to conduct their defense. And finally, the indictment was not returned until the eve of the running of the statute of limitations.

Marion and its progeny implicitly recognize that the policy considerations underlying the irrebuttable presumption of prejudice in cases barred by the statute of limitations, Toussie v. United States, 397 U.S. 112, 115 (1970), are also relevant to situations where the statutory period has not yet run. As the bar date approaches, the existence of actual prejudice becomes increasingly more probable.*

Virtually all the disputed facts material to the central issues of this case occurred outside the five-year period of limitation. Surely Congress's recognition, as embodied in the statute of limitations, that time can be the greatest hindrance to a criminal defense, should be considered on the question of the extent of actual prejudice.

This is especially true where, as is in this case, there was such a fine line between the prosecution's and defense's versions of the events which occurred in the Fall of 1969. As the Court recognized in his charge to the jury, the subtle differences in these versions could make an

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* Conversely, the further a case is from the expiration of the statute, the greater is a defendant's burden to demonstrate prejudice. United States v. Pollack, 534 F.2d 964, 969 (D.C. Cir. 1976) (Lumbard, J.); United States v. Capaldo, 402 F.2d 821, 823 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969).

otherwise entirely proper agreement violative of the federal securities laws. For example, Mecom's use of a KRC advance for his Arctic payment was not disputed. The only question was whether this advance had been promised to him prior to the consummation of the contract. Similarly, the possibility of a repurchase agreement would not have destroyed the arm's-length nature of the Mecom sale unless a commitment to that effect had been made prior to the sale and Mecom had relied thereon (App. 1445-47). When there is so little difference between the factual circumstances alleged by the parties to a criminal case, the prejudicial effects of delay are seriously magnified.

Mr. Justice Brennan, concurring in Dickey v. Florida, 398 U.S. 30 (1970) recognized that:

> ". . . concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and unavailable witnesses." 398 U.S. at 53.

Though the Court conceded that the Government's delay had occasioned "regrettable" losses of witnesses, evidence and recollections, he expressed the view that appellants had not been injured "to any material extent by the lapse of time" (App. 31). His conclusion was based, at least in part, on appellants' inability to do more than allege what they believed Cowett would or might have said at trial (App. 31). This ruling only confirms the difficulty of proving

material prejudice: no one can state with certainty what a dead witness would have said at trial. As the Court of Appeals for the District of Columbia observed in Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965):

> "In a very real sense, the extent to which [the defendant] was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." 349 F.2d at 215, quoted in 398 U.S. at 53-54.

Judge Frankel also stated that in assessing the effects of the prejudice to the defense of the Government's delay he had taken into account his personal conviction that appellants' guilt had been established "to the point of near certainty" (App. 29). This approach begs the question: the point of a claim of prejudice is that the Government's proof would not have appeared as convincing had the prejudice resulting from the delay not occurred. Our system of justice does not require a defendant to prove beyond a reasonable doubt via dead witnesses and destroyed documents that he, in fact, is innocent.

The defendants have demonstrated prejudice. The fact that KRC's independent trustee has reached the same conclusion on an ingredient of this prejudice is evidence that appellants' claims are more than reasonable. Under such circumstances, the Government, consistent with its constitutional burden, should be required to prove beyond a reasonable doubt that there was no prejudice created by its own delay.

Similar burdens have been imposed upon the Government in analogous circumstances where governmental action has deprived a defendant of his constitutional rights. For example, where errors of constitutional dimension have contributed to a conviction, the Government must demonstrate that such error was "harmless beyond a reasonable doubt." Chapman v. California, 86 U.S. 18, 24 (1967). In the comparable context of Sixth Amendment post-indictment delay claims of prejudicial delay, Mr. Justice Brennan suggested a similar standard:

> "Thus, it may be that an accused makes out a prima facie case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not responsible for the delay, and by alleging that the government might reasonably have avoided it. Arguably the burden should then shift to the government to establish, if possible, that the delay was necessary, by showing that the reason for it was of sufficient importance to justify the time lost." Dickey v. Florida, 398 U.S. at 56

Where, as here, the Government can provide no valid reason for delay nor prove lack of prejudice, the consequences of its inaction cannot be permitted to contribute to a criminal conviction. Marion's "delicate judgment based on the circumstances in each case" requires no less than a reversal of the convictions and a dismissal of this indictment.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR IN DENYING WITHOUT AN ADEQUATE HEARING APPELLANT'S MOTION TO DISMISS THE INDICTMENT BECAUSE OF THE GOVERNMENT'S USE OF EVIDENCE DERIVED FROM IMMUNIZED BANKRUPTCY TESTIMONY

Prior to and following trial appellant King moved pursuant to Bankruptcy Act § 7(a)(10) (11 U.S.C.A. § 25(a)(10) (Supp. 1976)) to dismiss the indictment on the ground that the Government derived some of its evidence from testimony given by him in the course of his personal bankruptcy proceedings. Appellant testified at numerous sessions of the first meeting of creditors, beginning on June 30, 1971. Voluminous presentations were made to the court demonstrating that inadequate steps had been taken by the Government to insulate its investigation from the immunized testimony. Space limitations prevent a recounting of this material. The court is respectfully referred to the Armstrong Affidavit of July 22, 1976 (App. 301-578).

Appellant contends that having demonstrated that (a) he testified under immunity in bankruptcy proceedings at which the public and Government personnel were present without restriction (App. 311-12, 321-32) and (b) that he gave testimony relating to the subject matters of the charges against him in this case (App. 321-32), it became the Government's burden to demonstrate that their investigation was not tainted by evidence derived from that proceeding. Kastiger v. United States, 406 U.S. 441, 461 (1972); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973).

The Court denied appellant's motion prior to trial, stating that it could more adequately be dealt with after trial

(App. 518-21). After trial the Court denied appellant's motion after a one day hearing called on two days' notice. Appellant discovered, after trial, that there was testimony in at least 19 sessions of his first meeting of creditors which had never been transcribed (App. 312-13). Appellant contended that the Government should make those transcripts available at a hearing. The Court denied this application. It is respectfully submitted that, under Kastiger, the Government has not met its burden of satisfying the Court that no taint existed and, especially, that in order to do so there must be a full hearing at which the Government produces the remaining transcripts.

POINT IV

APPELLANT KING ADOPTS ALL THOSE ISSUES OF LAW AND FACT ARGUED BY APPELLANT BOUCHER IN POINT III OF HIS APPEAL

King adopts Point III of Boucher's brief to this Court, and makes the following additional argument with respect to the erroneous admission of KRC director Neil MacKenzie's hearsay comment that the price paid by COG was "ridiculous" (App. 1324).

When the statement was first received in evidence, it was offered only against Boucher (App. 1340B). At counsel's request, the jury was instructed as to the limited admissibility (App. 1342). Immediately prior to summations, however, the Court advised the prosecutor that he could use the statement affirmatively as expert opinion on the Arctic's value (App. 1344). This was clearly reversible error. After the MacKenzie remark was highlighted in the Government's summation against King as well as Boucher (App. 1347), counsel for King sought a reaffirmation of the limiting instruction, but the Court refused on the ground that defense counsel had an opportunity to respond to the prosecutor's argument in their summations.*

This was also error. See Fed. R. Evid. 105. Evidence which was inadmissible against King cannot suddenly become

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* Emphasis was placed on the remark in both parts of the Government's bifurcated instruction (App. 1346, 1347).

admissible because the Government refers to it in the first part of its bifurcated summation. The improper use of MacKenzie's remark against King effectively denied King his constitutional right of confrontation. U.S. Const. Amend. VI. See Bruton v. United States, 391 U.S. 123 (1968).

CONCLUSION

For the reasons set forth herein, appellant King respectfully requests this Court to reverse the conviction below.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Appellee, -against- JOHN M. KING and A. ROWLAND BOUCHER, Defendants-Appellants.	C/A Ref. No. 76-1440 United States District Court Southern District of New York Hon. Marvin E. Frankel 75 Cr. 70 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Robert Rosenwein, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at .

That on the 10th day of January, 1977, deponent served the within Briefs for Defendant-Appellant King and Defendant-Appellant Boucher in this action by personally delivering copies of same to John R. Wing, U.S. Attorneys Office, 1 St. Andrews Plaza, New York, New York.

Robert Rosenwein

Sworn to before me this
10th day of January, 1977.

Joan Farrell
Notary Public

JOAN FARRELL
Notary Public, State of New York
No. 03-4521620
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 19